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Re: *In the Matter of Federal-State Joint Board on Universal Service*
CC Docket No. ~~46-45~~; FCC 96-93
96-45

Office of the Secretary
Federal Communications Commission
1919 M Street, NW
Washington, D.C. 20554

Dear Sirs and Madams:

Enclosed for filing in the above-referenced matter is the original and four copies of the Association of the Bar of the City of New York Administrative Law Committee Comment on Federal-State Joint Board on Universal Service. Copies of this Comment will be served upon Federal-State Joint Board service list by mailing *via* U.S. Postal Service First Class Mail on April 12, 1996.

Respectfully submitted,



David M. Ross, Chair

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

APR 12 1996

FCC MAIL ROOM

In the Matter of)

Federal-State Joint Board)
on Universal Service)
_____)

CC Docket No. 96-45
FCC 96-93

To: Office of the Secretary
Federal Communications Commission

ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

ADMINISTRATIVE LAW COMMITTEE

COMMENT ON

FEDERAL-STATE JOINT BOARD ON UNIVERSAL SERVICE

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**ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
ADMINISTRATIVE LAW COMMITTEE
COMMENT ON
FEDERAL-STATE JOINT BOARD ON UNIVERSAL SERVICE**

SUMMARY

The Telecommunications Act of 1996 was enacted on February 8, 1996. Prior to the passage of this legislation, the general principle of "universal service" under U.S. telecommunications policy could be described as the widespread availability of basic telephone service at affordable rates. This "bedrock" principle has helped to provide equal opportunities for all people in the United States to have access to telephone service through direct subsidies provided to low income and rural customers and by internal pricing mechanisms employed by phone companies. Under the Telecommunications Act of 1996, Congress has redefined "universal service" as an evolving level of telecommunications service that takes into account advances in telecommunications and information technologies and services. Congress also has delegated to the Federal Communications Commission the task of establishing a current definition of "universal service" pursuant to seven "Universal Service Principles," and required the formation of a Federal-State Joint Board on Universal Service to make recommendations to the Commission.

On March 8, 1996, the Commission initiated a rulemaking to: (1) define the services that will be supported by Federal universal service support mechanisms, (2) define those support mechanisms, and (3) otherwise recommend changes to FCC regulations to implement the universal service directives contained in the recently enacted telecommunications statute.

The Committee on Administrative Law of the Association of the Bar of the City of New York offers the following response to certain of the Commission's specific requests for comments on a proposed rulemaking concerning the definition of universal services and the implementation of such services by telecommunications providers:

- We believe that an additional universal service principle should be adopted that specifically provides for access to interactive services, such as the Internet, for low income, inner city, and rural residents.
- We believe that the Commission should include access to existing interactive services within the definition of core universal services, even if a substantial majority of residential customers are not currently subscribers for such services.
- We recommend a broad interpretation of the advanced services accessible in public institutions, such as schools and libraries, as a means to ensure that timely access to interactive services will be made available to low income, inner city, and rural residents.

Each of these positions is supported by a review and analysis of the relevant statutory language and legislative history.

By offering these comments, the Committee on Administrative Law of the Association of the Bar of the City of New York supports the FCC's regulation of *access* to telecommunications services pursuant to the universal service provisions of the Telecommunications Act of 1996. The Committee, however, specifically does not address herein, nor should our comments be construed to support, any attempt by the government under the Act or the rules promulgated thereunder to regulate the *content* of any telecommunications services.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)

CC Docket No. 96-45

Federal-State Joint Board)
on Universal Service)

FCC 96-93

To: Office of the Secretary
Federal Communications Commission

**ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
ADMINISTRATIVE LAW COMMITTEE
COMMENT ON
FEDERAL-STATE JOINT BOARD ON UNIVERSAL SERVICE**

The Committee on Administrative Law of the Association of the Bar of the City of New York ("Committee") submits this comment in response to the notice of proposed rulemaking ("Notice") adopted on March 8, 1996 by the Federal Communications Commission ("FCC" or "Commission") regarding the above-captioned matter.

I. Introduction

On February 8, 1996, Congress enacted the Telecommunications Act of 1996.^{1/} Pursuant to Section 254(a)(1) of the Act, the Commission was required to institute and refer to a Federal-State Joint Board a proceeding to recommend regulatory changes in order to implement, *inter alia*, the provisions of the Act concerning universal service. Subsequently,

^{1/} *Telecommunications Act of 1996*, Pub. L. No. 104-104, 110 Stat. 56 (1996) (hereinafter *Act*).

by adopting and issuing the Notice.^{2/} the Commission initiated a rulemaking to: (1) define the services that will be supported by Federal universal service support mechanisms, (2) define those support mechanisms, and (3) otherwise recommend changes to FCC regulations to implement the universal service directives of the Act.^{3/}

The Committee has reviewed the Notice. We limit our comments at the present time to the following specific issues upon which the Commission has solicited comments.^{4/}

First, we believe that the existing principle supporting universal access to advanced telecommunications and information services is too general to ensure that all citizens of this Nation have access to interactive services that will allow them to exercise fully their free speech and assembly rights guaranteed under the First Amendment. Accordingly, we believe that the Commission should adopt an additional principle that expressly refers to access to interactive services.^{5/}

^{2/} *Proposed Rules: Federal Communications Commission*, 61 Fed. Reg. 10499, 1996 WL 108610 (to be codified at 47 C.F.R. pts. 36 & 69) (proposed March 8, 1996) (hereinafter *Notice*).

^{3/} *Notice* (Summary) at 10500. The Act requires the FCC to act upon these recommendations by conducting a single implementation proceeding that will conclude within 15 months after enactment. *See Act* § 254(a)(2), 110 Stat. 56, 71.

^{4/} By offering these comments, the Committee on Administrative Law of the Association of the Bar of the City of New York supports the FCC's regulation of *access* to telecommunications services pursuant to the universal service provisions of the Telecommunications Act of 1996. The Committee, however, specifically does not address herein, nor should our comments be construed to support, any attempt by the government under the Act or the rules promulgated thereunder to regulate the *content* of any telecommunications services.

^{5/} These include, for example, electronic mail, Usenet, bulletin boards, chatlines, multi-user domains (MUDS), and, of course, the World Wide Web. *See* Fred H. Cate, *The First Amendment and the National Information Infrastructure*, 30 WAKE FOREST L. REV. 1, 4 (1995) (hereinafter Cate).

Second, we agree with the Commission that it has discretion to apply the criteria for defining universal services under Section 254(c)(1) of the Act. Accordingly, we believe that as long as other statutory criteria are met, the Commission should determine that a core universal service can be defined to include access to existing interactive services, even if the majority of residential customers do not yet subscribe to those services.

Third, we agree with the statement in the Notice that the Commission can define universal services more broadly under Section 254(h)(2) of the Act than under Section 254(c)(1). Accordingly, we believe that timely access to interactive services should be made available to low income, inner city, and rural customers through public institutions, such as libraries and schools.

II. Background

The Act expressly requires a federal definition of telecommunications services that should be categorized as "universal service."^{6/} To define universal service, the Act establishes a Federal-State Joint Board on Universal Service ("Joint Board") to make recommendations to the Commission regarding implementation of universal service goals.^{7/}

According to a recent report prepared by the Telecommunications Industries Analysis Project, the concept of "Universal Service" during much of this century meant "a widespread, interconnected telephone network wherein every user of the network could connect with every other user."^{8/} This concept subsequently evolved, however, and has come to mean "the provision of service to everyone at 'affordable rates'" primarily through direct and indirect subsidies and internal pricing mechanisms.^{9/}

The Joint Board's definition of universal service will likely build upon prior definitions that considered universal service to include the minimal level of

^{6/} Act § 254(a)(1), 110 Stat. 56, 71; JOINT EXPLANATORY STATEMENT OF THE COMM. OF CONF., H.R. Rep. No. 104-458, 104th Cong., 2d Sess. 131 (1996) (hereinafter CONFERENCE AGREEMENT).

^{7/} See Act § 254(a)(1), 110 Stat. 56, 70.

^{8/} CAROL WEINHAUS ET. AL, TELECOMMUNICATIONS INDUSTRIES ANALYSIS PROJECT, OVERVIEW OF UNIVERSAL SERVICE 2 (citing Milton Mueller, *Universal Service in Telephone History: A Reconstruction*, IN TELECOMMUNICATIONS POLICY 352 (1993)) (Presentation at the Communications Media Center, New York Law School, Dec. 9, 1995) (hereinafter OVERVIEW OF UNIVERSAL SERVICE).

^{9/} *Id.* (referring to "complex system of subsidies wherein some companies and customers pay a portion of the costs of providing serve to other customers"); Ted Hearn, *FCC to Redefine Universal Service*, 17 MULTICHANNEL NEWS 40 (March 18, 1996).

telecommunications services that should be accessible by individuals in the United States.^{10/} Insofar as the Act defines "universal service" as an "evolving level of telecommunications services," the Commission (and the Joint Board) are required, periodically, to take into account "advances in telecommunications services and informational technologies and services."^{11/} This continuing modification of the definition of universal service is necessary to extend the benefits of the information revolution to all citizens:

A revolution is not complete without extending its benefits to everyone. "Universal service," that is, the widespread availability of basic telephone service at affordable rates, has been a bedrock principle of U.S. telecommunications policy for many years, and helped provide equal opportunities for all people in the United States to communicate. This principle should be expanded to the advanced infrastructure of the future.^{12/}

^{10/} See JOHN THORNE, PETER W. HUBER, MICHAEL K. KELLOGG, *FEDERAL BROADBAND LAW* §§ 12.1, 12.1.1, 12.5.1 (1995) (citation omitted) (hereinafter *BROADBAND LAW*). See also Joseph A. Post, *Universal Service and the Information Superhighway: Perspectives from the Telecommunications Experience*, 64 *FORDHAM L. REV.* 782 n.1 (1995) ("'Universal Service' is a regulatory concept that holds that certain services are so important that they should be made universally available").

^{11/} Act § 254(c)(1), 110 Stat. 56, 72; CONFERENCE AGREEMENT, at 131.

^{12/} *Telecommunications Reform Legislation: Hearings on Telecommunications Reform Legislation, Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 103rd Cong., 2d Sess. (1994), 1994 WL 213538 *10-*11 (Statement of Larry Irving, Ass't Sec. for Communications and Information, U.S. Dep't of Commerce).

Principles Applicable to Universal Service

The Joint Board and the Commission are required, pursuant to Section 254(b), to base policies for the preservation and advancement of universal service on the following six principles:

- (1) **QUALITY AND RATES.**-- Quality services should be available at just, reasonable, and affordable rates.
- (2) **ACCESS TO ADVANCED SERVICES.**-- Access to advanced telecommunications and information services should be provided in all regions of the Nation.
- (3) **ACCESS IN RURAL AND HIGH COST AREAS.**-- Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.
- (4) **EQUITABLE AND NONDISCRIMINATORY CONTRIBUTIONS.**-- All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal services.
- (5) **SPECIFIC AND PREDICTABLE SUPPORT MECHANISMS.**-- There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.
- (6) **ACCESS TO ADVANCED TELECOMMUNICATIONS SERVICES FOR SCHOOLS, HEALTH CARE, AND LIBRARIES.**-- Elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services

A seventh principle permits the Joint Board and the FCC to adopt additional principles that they "determine are necessary and appropriate for the protection of the public interest, convenience and necessity and are consistent with this Act."^{13/}

Criteria for Evaluating the Definition of Core Universal Services

Section 254(c)(1) of the Act instructs the FCC to modify the "evolving level of telecommunications services" qualifying for "universal service support mechanisms" by considering the extent to which such telecommunications services:

- (A) are essential to education, public health, or public safety;
- (B) have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers;
- (C) are being deployed in public telecommunications networks by telecommunications carriers; and
- (D) are consistent with the public interest, convenience, and necessity.

Enhanced Access for Public Institutions

Section 254(h)(2)(A) states that the FCC shall establish rules:

to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services for all public and non-profit elementary and secondary school classrooms, health care providers, and libraries.^{14/}

It is important to note that Section 254(h)(2) applies to public institutions, whereas Section 254(c)(1) applies to all telecommunications customers.

^{13/} Act § 254(b)(7); 110 Stat. 56, 72.

^{14/} Act § 254(h)(2)(A), 110 Stat. 56, 74; *see also id.* § 254(b)(6), 110 Stat. 56, 72 (principle regarding access to advanced services for schools, health care providers, and libraries).

Telecommunications Carrier Contribution^{15/}

Section 254(d) states, in part, that

Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service.^{16/}

Section 254(f) requires the same contributions by telecommunications carriers that provide intrastate telecommunications services, subject to state regulations "not inconsistent with the Commission's rules to preserve and advance universal service."^{17/}

^{15/} The Administrative Law Committee of the Association of the Bar of the City of New York offers no comments upon either the existing contribution scheme for the provision and implementation of universal service, nor upon any future contribution schemes in accordance with the definition and implementation of universal service under the Act. *Cf. Notice* ¶¶ 118-120 ("Who Should Contribute"), ¶¶ 121-125 ("How Should Contributions Be Assessed"), and ¶¶ 127-131 ("Who Should Administer"). In light of the fundamental democratic and free speech principles addressed herein, we have considered "cost" as a factor in connection with our proposals only to the extent that the Commission has sought comment upon whether a broader definition of universal service should apply to public institutional users under Section 254(h)(2) of the Act than to individual residents under Section 254(c)(1) of the Act. *See, e.g., infra* III.(C).

^{16/} *Act* § 254(d), 110 Stat. 56, 73. "Telecommunications" is defined under the Act as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." *Act* § 153(48), 110 Stat. 56, 60; *Notice* ¶ 118. "Telecommunications carrier" is defined as "any provider of telecommunications services," which in turn, is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." *Act* § 153(49), (51), 110 Stat. 56, 60; *Notice* ¶ 118.

^{17/} *Act* § 254(f), 110 Stat. 56, 73.

III. Discussion

A. THE COMMISSION SHOULD ADOPT AN ADDITIONAL PRINCIPLE THAT SPECIFICALLY PROVIDES FOR ACCESS TO INTERACTIVE SERVICES

Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and this should be a fundamental principle of the American government

Mr. Justice Brandeis, concurring in
Whitney v. California^{18/}

In accordance with the seventh principle articulated in Section 254(b), the Commission solicited comments about the need for additional principles. Specifically, the FCC has invited "interested parties to propose additional principles relevant to the choice of services that should receive universal service support."^{19/} The Commission stated that such services might include "Internet access availability."^{20/}

We believe that the definition of universal service should expand the historical "minimalist commitment" by including the following principle:

ACCESS TO INTERACTIVE SERVICES. -- Individuals in all regions of the Nation, including low income individuals and those in rural, insular, and high cost areas, should have access to

^{18/} 274 U.S. 357, 375-76, 47 S. Ct. 641, 648 (1927).

^{19/} Notice ¶ 8. See also *id.* ¶ 23 (inviting comment on "advanced services that may warrant inclusion, now or in the future, in the list of services that are supported by universal service support mechanisms").

^{20/} *Id.* ¶ 23.

interactive information services^{21/} that allow them to be publishers as well as recipients of information. The definition of "interactive information services" should evolve and relate directly to the services available to businesses and middle and upper income Americans dwelling in urban centers.^{22/}

This principle may be considered to be a discrete principle, or a more specific description of the "advanced services" delineated in Section 254(b)(2).^{23/}

^{21/} For a general definition of "interactive," see Kent D. Stuckey, *Market Without Bounds -- So Far: Could Old Laws Put a Crimp on Cyberspace?*, 5 BUS. LAW. 52 (March/April 1996):

[N]ew media services are interactive. This means you are in control of what is seen when, and it usually means you can talk back, or submit your own information to share with other users. This may consist of one-on-one chat or group conferencing on a real-time basis. At a minimum, it allows you to determine the time you use the service or product and the portions you can use.

^{22/} The Information Infrastructure Task Force discussed a similar principle in The National Information Infrastructure: Agenda for Action. The fourth principle and goal for government action is to "promote seamless, interactive, user-driven operation," which includes assurances that networks are "sufficiently 'open' and interactive so that users can develop new services and applications or exchange information among themselves"

The Alliance for Public Technology also proposed a similar principle in their report, *Connecting Each to All*. The Alliance advocated support for the goal of "Advanced Universal Service," which would:

make available as far as possible, to all people of the United States, regardless of race, color, national origin, income, residence in rural or urban areas, or disability, high capacity two-way communications networks capable of enabling users to originate and receive affordable and accessible high quality, voice, data, graphics, video and other types of telecommunications services. <http://www.benton.org>.

^{23/} We note that ensuring universal access to interactive services is not the equivalent of ensuring actual use of such services. *Cf. Telecommunications Competition and*
(continued...)

This recommendation seeks to address the concern that limitation of advanced, interactive telecommunications services only to a restricted segment of our society will deprive the rest of the population of an opportunity to become more than passive consumers of information.^{24/} Barred from access to interactive communications services such as the Internet, an information "underclass" will continue to develop.^{25/} The democratic virtue of

^{23/}(...continued)

Deregulation Act of 1995: SENATE COMM. ON COMMERCE, SCIENCE, AND TRANSPORTATION, S. REP. No. 104-23, 104th Cong., 1st Sess. 27 (1995) (hereinafter 1995 Act):

[T]he Committee intends the definition of universal service to ensure that the conduit, whether it is a twisted pair wire, coaxial cable, fiber optic cable, wireless, or satellite system, has sufficient capacity and technological capability to enable consumers to use whatever consumer goods that they have purchased, such as telephone, personal computer, video player, or television, to interconnect to services that are available over the telecommunications network. The Committee does not intend the definition of universal service to include the purchase of equipment, such as a computer or telephone, that is owned by the consumer and is not integral to the telecommunications service itself.

^{24/}

The marvel of plain old telephone service is that it is ubiquitous; no need to carp that it is very plain indeed. In this static and familiar world, universal service means that rich and poor get pretty much the same thing, little though it is. We claim victory in our pursuit of universal service precisely because the service is universally modest.

BROADBAND LAW, at § 12.1 (citing Gerry Butters, 1991 Annual Review of the Institute for Information Studies, *The Future of Universal Service in Telecommunications, Special Report: Universal Service, Ready for the 21st Century?*, EDGE, Dec. 2, 1991, at 75).

^{25/}

See Mary Gardiner Jones, *The Promise of the NII: Universal Service is the Key*, in 20/20 VISION: THE DEVELOPMENT OF A NATIONAL INFORMATION INFRASTRUCTURE 102 (U.S. Dep't of Comm. 1994) (hereinafter 20/20 VISION) (discussing universal

(continued...)

full participation in public dialogue will be lost to everyone.^{26/} And the Constitutional prerogatives of free speech, enhanced by interactive services, will be available only to those

^{25/}(...continued)

service as a means "to make certain that no American will be deprived of the benefits of these services by reason of income or disability"). *See also* U.S. DEP'T OF COMM., FALLING THROUGH THE NET: A SURVEY OF THE "HAVE NOTS" IN RURAL AND URBAN AMERICAN 3 (1995) (hereinafter FALLING THROUGH THE NET) (defining the "have nots" and discussing means for "[e]mpowering the [i]nformation [d]isadvantaged").

^{26/} *See* Allen S. Hammond, IV, *The National Information Infrastructure Report: A Welcome Call to Action*, in 20/20 VISION 59-60 (discussing electronic speech policy); Henry H. Perritt, Jr., *Sources of Rights to Access Public Information*, 4 WM. & MARY BILL RTS. J. 179, 180 n.21 (1995) (Internet makes possible a worldwide distributed information system, functioning as an electronic marketplace, production line, and town hall); *see also* Cate, *supra* note 4, at 34:

The internet connects more than 45,000 separate networks and 25 to 30 million users in more than 100 countries, and is growing at the rate of 750,000 new users per month.

See generally Jeffrey B. Abramson, *Democratic Designs for Electronic Town Meetings* 2-8 (Aspen Institute ed. 1992).

who can afford access to more than basic telephony.^{27/} Mitchell Kapor, co-founder of the Electronic Frontier Foundation, has cautioned that:

Five hundred channels can carry a lot of information, but they allow only a one-way distribution of information from the network operator down into each subscriber's home. The interactivity that is critical for educational services, for library access, for online medical assistance, for telecommuting or rural business connections and for the next generation of multimedia entertainment, cannot be accommodated in a closed, one-way system.^{28/}

We recognize that full implementation of our proposed principle (*i.e.*, providing interactive services access to all individual residents) may be impeded at present by uncertainty concerning technological developments, competition among telecommunications stakeholders, and the potentially prohibitive cost of accelerating access to advanced

^{27/} See *The NII Field Hearings on Universal Service and Open Access: A Summary 8* (Preliminary Report Transmitted to the IITF on July 26, 1994) (discussing testimony that Universal Service goal should be redefined to include more than POTS):

With the advent of new services and capabilities attributable to robust technological change . . . there exists considerable sentiment for expanding the definition [of Universal Service] beyond basic analog voice-grade service.

Access to interactive telecommunications services offers many exciting possibilities. For instance, the FCC and Congress noted that:

Modern two-way, interactive capabilities will not only enable users at schools, libraries and rural health care facilities to access information, but also give students the ability to participate in educational activities at other schools

Notice ¶ 72 n.162 (quoting S. CONF. REP. NO. 104-230, 104th Cong., 2d Sess. 132-33 (1996)).

^{28/} Mitchell Kapor, *Building Open Platforms: Public Policy for the Information Age in 20/20 VISION* 127 (March 1994) (hereinafter *Building Open Platforms*).

telecommunications services.^{29/} Therefore, we propose that, at a minimum, all citizens should be provided with access to existing, established interactive services (including the Internet) through such institutions as libraries^{30/} and schools.^{31/}

One immediate means, however, to implement the principle of "access to interactive services" is to include single party service in the category of core universal services.^{32/} Insofar as "single party service" is a recognized prerequisite for interactive access to the Internet via modem and PC, the Commission should designate single party service as a core service.^{33/}

^{29/} See, e.g., OVERVIEW OF UNIVERSAL SERVICE, at 21 (discussing "Implications of Changing What Universal Service Means") and Figure 15 ("What is the Cost of Expanding the Universal Service Definition to Include Broadband") and Figure 16 ("What Happens if Broadband Deployment is Mandated?").

^{30/} See 20 U.S.C. § 351(a)(5).

^{31/} See *infra* III.C.

^{32/} See Notice ¶¶ 16 & 20 (seeking comment upon, *inter alia*, whether "single party service" should be a core service receiving universal service support).

^{33/} See Notice ¶ 20. We note that under the evolving definition of universal service required under Section 254(c)(1) of the Act, single party service may also be consistent with the public interest, convenience, and necessity by providing residential access to other advanced telecommunications services as they become available. See *id.* ("single party service facilitates access to many information technologies").

B. ACCESS TO INTERACTIVE SERVICES SHOULD BE PROVIDED EVEN IF A SUBSTANTIAL MAJORITY OF RESIDENTIAL CUSTOMERS DO NOT YET SUBSCRIBE TO SUCH SERVICES

In order to have a large number of values in common, all members of the group must have an equable opportunity to receive and to take from others. There must be a large variety of shared undertakings and experiences. Otherwise, the influences which educate some into masters, educate others into slaves. And the experience of each party loses in meaning, when the free interchange of varying modes of life-experience is arrested.

John Dewey,
DEMOCRACY AND EDUCATION^{34/}

Based upon the express language of the Act and fundamental rules of statutory construction,^{35/} we believe that the Joint Board and the Commission are fully authorized under the Act to include advanced information services in the category of core universal services. Section 254(c)(1) of the Act states that the Joint Board and the Commission "shall consider" four factors in order to determine what services qualify for Federal universal service support mechanisms.^{36/} The Commission has interpreted the statutory language "shall consider" to allow the Joint Board and the Commission discretion in applying the four criteria specified in the Act^{37/} to decide which services should receive universal service support.^{38/}

^{34/} 84 (The Free Press 1966) (1915).

^{35/} See Norman J. Singer, SUTHERLAND STAT. CONST. § 65.03 (5th ed. 1992).

^{36/} Act § 254(c)(1), 110 Stat. 56, 72.

^{37/} Act § 254(c)(1); see *supra* II.

^{38/} See Notice ¶ 9:

(continued...)

Other portions of the legislative history and the Act also authorize the Joint Board and the Commission to expand the definition of universal service. For instance, Section 254(c)(1) of the Act acknowledges that "[u]niversal service is an evolving level of telecommunications services."^{39/} The Joint Explanatory Statement of the Committee of Conference ("Conference Agreement") also clearly explains the Congressional intent to delegate authority to the FCC to alter the definition of universal service as telecommunications services evolve.^{40/} Furthermore, Section 254(a)(1) and Section 254(a)(2) of the Act specifically instruct the Joint Board to recommend and the FCC to enact a "definition of the services that are supported by Federal universal service support mechanisms" By explicitly recognizing the evolving nature of the definition of universal service and endorsing the principle of access to enhanced telecommunications and information services,^{41/} Congress demonstrated its intention to authorize the Commission to update the existing minimalist commitment.^{42/}

^{38/}(...continued)

We interpret the statutory language of Section 254(c)(1) as manifesting Congressional intent that the Joint Board and the Commission consider all four criteria when deciding what services to support through Federal universal service. We interpret this language, however -- particularly the use of the word "consider" -- to allow the Joint Board and the Commission to include services that do not necessarily meet all four criteria.

^{39/} Act § 254(c)(1); 110 Stat. 56, 72.

^{40/} CONFERENCE AGREEMENT, at 131.

^{41/} Act § 254(b)(2); 110 Stat. 56, 72.

^{42/} Although Congress authorized the Commission to modify the definition of universal service, certain provisions of the Act require the Commission to consider cost as a factor. *See, e.g., Act § 254(h)(2)(A)*, 110 Stat. 56, 74 ("to enhance, to the extent technically feasible *and economically reasonable*, access to advanced telecommunications and information services" for schools, health care providers, and libraries) (emphasis added). *See also* Ted Hearn, *FCC to Redefine Universal Service*,
(continued...)

To exercise this discretion, the Commission requests comments about, *inter alia*, how to evaluate whether a service or feature is essential to education, public health, or public safety.^{43/} According to the Notice, the minimal level of acceptable service is likely to include the following core services: (1) voice grade access to the public switched network, with the ability to place and receive calls; (2) touch-tone service; (3) single party service; (4) access to emergency services, *e.g.*, "911" service; and (5) access to operator services.^{44/} These five core services, however, do not represent advanced telecommunications services.^{45/} Instead, they reflect an update of what has been referred to as "historically . . . a minimalist commitment to providing a single, basic service -- what is sometimes called Plain Old Telephone Service (POTS)."^{46/}

^{42/}(...continued)

17 MULTICHANNEL NEWS, Mar. 18, 1996, at 39-40 (Joint Board on Universal Service "has the option of expanding the components of universal service, [but] runs the risk of driving up the cost to provide those services for incumbent phone companies and new entrants like cable operators that might be called upon to contribute to a universal service fund.").

^{43/} Notice ¶¶ 9 & 15.

^{44/} Notice ¶ 16.

^{45/} Compare Act § 254(b), 110 Stat. 56, 71-2 with § 254(c), 110 Stat. 56, 72; see generally CONFERENCE REPORT, at 131.

^{46/} Fred H. Cate, *Communications Symposium, The National Information Infrastructure: Policymaking and Policymakers*, 6 STAN. L. & POLICY REV. 43 (1994). Cates observed that:

[A] . . . universal service commitment that does not go beyond the information equivalent of [Plain Old Telephone Service] will greatly divide the information "haves" and "have-nots" Yet a more sweeping definition of universal service will impose high costs and threatens to delay widespread deployment [of advanced digital information services].

To expand the definition of universal service beyond Plain Old Telephone Service, we believe that the Joint Board and the FCC should give less weight to the criteria in Section 254(c)(1)(B). That Section, which pegs the definition of universal services to what is already available to "a substantial majority of residential customers," is problematical because it would cause service to the minority of residential customers to lag continually behind the majority -- thereby perpetuating the rift that universal service support mechanisms are supposed to overcome.^{47/} Potentially, the result is a widening of the schism between those with up-to-the-moment access to advanced telecommunications services and those straggling behind with only Plain Old Telephone Service. Allen Hammond, Director of New York Law School's Communications Media Center, has warned that "[i]n developing the super-net, inner cities and rural areas should not be bypassed again the way they were when cable television was introduced nor should current failures to assure affordable access in telephony be compounded by the super-net."^{48/}

To reduce the risk of inequitable access to advanced telecommunications and information services, we believe that in deciding whether a service qualifies for universal

^{47/} The Information Infrastructure Task Force observed that:

A major objective in developing the [information highway] will be to extend the Universal Service concept to the information needs of the American people in the 21st Century. As a matter of fundamental fairness, this nation cannot accept division of our people among telecommunications or information "haves" and "have-nots."

INFORMATION INFRASTRUCTURE TASK FORCE, THE NATIONAL INFORMATION INFRASTRUCTURE, AGENDA FOR ACTION 8 (1993).

^{48/} See Allen S. Hammond, IV, *The National Information Infrastructure Report: A Welcome Call to Action*, in 20/20 VISION) 66 (March 1994).

service support, the Commission should accord less weight to existing subscription levels for interactive services. Instead, the Commission should assign greater weight to: (1) how interactive services further education, health, and safety; (2) the current deployment of interactive services; and (3) the public interest, convenience, and necessity of providing immediate access to advanced communications services.^{49/}

^{49/} Cf. 1995 Act, *supra*, at 3 (emphasis added):

To ensure that the definition of universal service evolves over time to keep pace with modern life, the subsection [on universal service] requires the FCC to include, at a minimum, any telecommunications service that is subscribed by a substantial majority of residential customers.

Notably, the Act contains no such "minimum" requirement. Rather, the express language of the Act, along with the relevant legislative history, *see supra*, clearly shows that Congress intended that the Commission could exercise its discretion with respect to "the substantial majority of residential customers" criteria.

C. TIMELY ACCESS TO INTERACTIVE SERVICES SHOULD BE MADE AVAILABLE THROUGH PUBLIC INSTITUTIONS

The free institutions which the inhabitants of the United States possess, and the political rights of which they make so much use, remind every citizen, and in a thousand ways, that he lives in society. They every instant impress upon his mind the notion that it is the duty as well as the interest of men to make themselves useful to their fellow creatures

Alexis de Tocqueville,
DEMOCRACY IN AMERICA^{50/}

The Notice requests comments about whether the "advanced telecommunications and information services" addressed in Section 254(h)(2), which applies to certain public institutions, should be "a broader, narrower, or identical group to those supported under Section 254(h)(1)."^{51/} The Notice also invites parties "to discuss advanced services that may warrant inclusion, now or in the future, in the list of services that are supported by universal service support mechanisms."^{52/} We propose that the answer to these requests is that the definition of "advanced telecommunications and information services" in Section 254(h)(2) should, at this time, be broader than the definitions applied under Sections 254(c)(1) and 254(h)(1).

The above interpretation will increase the likelihood that the advanced services defined in Section 254(h)(2) will keep pace with the cutting edge of technology used by businesses

^{50/} Vol. II, 2d Book, Ch. IV, at 122 (Henry Reeve & Francis Bowen trans., Phillips Bradley ed. 1945) (1840).

^{51/} Notice ¶ 109.

^{52/} Notice ¶ 23 ("For example, within the context of the criteria discussed in Section 254(c)(1) [of the Act], commenters may wish to discuss Internet access availability, data transmission capability, optional Signalling System Seven features or blocking of such features, enhanced services, and broadband services").

and available chiefly to middle and upper income, urban residential users.^{53/} This statutory construction also will enable individuals to have access to advanced services through public institutions, such as libraries and schools,^{54/} even if the services do not yet qualify for universal service support and are not yet available in residences.^{55/} This definition will therefore be independent of the criteria applied to the definition of universal service for individuals, which may be linked to an evaluation of whether a substantial majority of consumers subscribes to the services.^{56/}

^{53/} See generally FALLING THROUGH THE NET 1-3; see also S. REP. No. 104-23, 104th Cong., 1st Sess. 27 (1995) (referring to level of communications services that the FCC determines should be provided at an affordable rate to allow all Americans access to information, cable, and advanced telecommunications services).

^{54/} See Charles R. McClure, *Public Libraries, The Public Interest, and The National Information Infrastructure (NII): Expanding the Policy Agenda*, in 20/20 VISION 41 (March 1994).

One vision of education in the networked society is to have public libraries all connected to the national network. Any person could access the array of information resources and services simply by using the "network room" in the library. Students could work interactively on lessons, adult learners could tap into endless instructional tools and persons providing support to use those tools. Virtual learning communities can form and grow. Regardless of one's personal situation, access to and knowledge about the Internet could be obtained from the local public library.

^{55/} We note, however, that when a substantial majority of residential customers have subscribed to advanced telecommunications services such as the Internet, then the Commission has the discretion to establish that such services fall within the definition of services supported by Federal universal support mechanisms. See Act § 254(c)(1)(C).

^{56/} See CONFERENCE AGREEMENT, at 133:

[T]he Commission could determine that telecommunications and information services that constitute universal service for

(continued...)